

**WONG THIAM PHIN v. LABUAN FERRY CORPORATION
SDN BHD & ANOTHER CASE**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG J
[CIVIL SUITS NO: LBN-22-7-4-2013 & LBN22-15-6-2013]
13 NOVEMBER 2015

CIVIL PROCEDURE: *Civil Law Act 1956 – Section 3(1) – Applicability of common law principle – Doctrine of prime necessity – Plaintiff owned and operated lorries or trailers that transport goods – Defendant provided ferry services – Charges for use of ferry services – Charges unilaterally increased by defendant – Plaintiff's complaint met with denial of ferry services – Whether defendant abused power as sole operator and monopoly of ferry services – Whether common law principle of prime necessity applies in Malaysia – Whether defendant ought to charge reasonable price for services provided – Whether defendant under duty to act in public interest*

CONTRACT: *Breach – Performance of contract – Inducement – Inducement leading to breach of contract – Claim for damages – Whether defendant abused power as sole operator and monopoly of ferry services – Whether defendant induced breach of contract between plaintiff and another company*

The present case comprised two suits ('the first suit' and 'the second suit') that were jointly heard. The plaintiffs, owners or operators of lorries or trailers that transport goods between Sabah and Labuan, claimed for the refund of extra charges in the sum of RM133,990 and RM1,250,860 for the first and second suits, respectively. By virtue of a licence granted by the Sabah Government, the defendant became the sole operator and monopoly of the ferry services between Menumbok, Sabah and Labuan until the middle of 2012. The plaintiffs complained that in January 2011, the defendant unilaterally and unlawfully increased the charges for the use of ferry services between the two points. The existing ticket price for a nine ton lorry carrying a load was at RM270 whereas the increased ticket price from Menumbok to Labuan was RM1,080 per lorry and it was RM1,120 per lorry from Labuan to Menumbok. In April 2012, the charges were increased to RM1,500 and RM1,800, depending on the types of vehicles used. As a result of the plaintiffs' complaints, the defendant retaliated and denied the plaintiffs the use the ferry services. The plaintiffs consequently could not deliver goods and services to their clients; had four of their vehicles stranded in Labuan for many months; and totally lost the use of these vehicles during the period. The plaintiffs contended that under the doctrine of prime necessity, the defendant was under a duty to act in the public interest to serve all in providing its services to the public without discrimination without unreasonable exclusion and at reasonable prices. The plaintiff in the first suit also claimed for damages against the defendant for allegedly causing breach

- A of his contract with a company known as Gold Coin. The issues for the court's adjudication were (i) whether the common law doctrine of prime necessity applies in Malaysia; (ii) whether the defendant was the sole provider of the essential services and if yes, whether the defendant was required to charge a reasonable price for the service provided; and (iii) whether the defendant had interfered with the performance of the plaintiff's contract with Gold Coin.

Held (allowing claims in part):

- (1) Under the doctrine of prime necessity, a business invested with monopoly of a public privilege must, in the absence of good cause, make its facilities available to all and at a reasonable price. Although the doctrine of prime necessity had not been decided in Malaysia, the facts and laws are straightforward. Based on s. 3(1) of the Civil Law Act 1956, case laws and the facts and circumstances of this case, there was no reason why the doctrine of prime necessity should not be applied or could not be part of the common law of this country. (paras 26, 31 & 71)
- (2) The defendant was the sole operator and had a monopoly over the ferry services between the two points and there was no bridge or land connection or link between Labuan and Sabah. The said ferry services operated by the defendant under the aegis of the Sabah Government were essential to trade, commerce and transportation between Labuan and Sabah. (para 29)
- (3) The Sabah Government had regulated the fares for the ferry services between the two points since 1991. Under cl. 8 of the contract entered into between the Sabah Government and the defendant, the latter was required to charge the existing fares and no increase in the fares was allowed without the prior written consent of the government. (para 35)
- (4) The defendant had operated the ferry services between the two points but did not install any weighbridge or weighing machines at the ferry terminals. Therefore, the defendant did not and could not weigh the lorries or vehicles of the plaintiffs when using the ferry services to determine the correct fares to be charged. In any case, there was no basis for the defendant to charge or increase the ferry rates. In doing so, it failed to charge the regulated fares and must return the differences. The defendant must refund the differences in the fares amounting to RM112,670 to the plaintiff in the first suit. In the second suit, the defendant must refund the sums of RM14,7600, RM204,610, RM95,140, RM60,680 and RM18,640 to the first to sixth plaintiffs, respectively. (paras 40, 41, 45 & 48)

(5) The plaintiff failed to establish on the balance of probabilities that the defendant knew of the Gold Coin contract and therefore intended to interfere with its performance. There was also no evidence that the defendant had threatened to interfere with the performance of the Gold Coin contract. The plaintiff could easily and should have contracted or sub-contracted the second to sixth defendants to transport the Gold Coin goods on his behalf since they were not affected by the ban or refusal by the defendant to sell the ferry tickets to them. If the plaintiff had done that, his contract with Gold Coin could be performed, would not be affected and might not be terminated. (paras 61, 63 & 64)

Case(s) referred to:

Allnutt v. Inglis (1810) 12 East 527 (*refd*)
British Industrial Plastics v. Ferguson [1940] 1 All ER 479 (*refd*)
Iveagh (Earl) v. Martin and Another [1960] 2 All ER 688 (*refd*)
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC (*refd*)
Minister of Justice for the Dominion of Canada v. City of Levis [1919] AC 505 (*refd*)
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (*refd*)
Sky City Auckland v. Wu [2002] 3 NZLR 621 (*refd*)
Tribune Investment Trust Inc v. Soosan Trading Co Ltd [2000] 3 SLR 405 (*refd*)
Vector Ltd v. Transpower New Zealand Ltd [1999] 3 NZLR 646 (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 3(1)(b)
 Competition Act 2010, s. 10(1)
 Imperial Laws Application Act 1988 [NZ], s. 5

(Civil Suit No: LBN-22-7-4-2013)
 For the plaintiff - Kailesh Aru; M/s Kailesh Aru & Co
 For the defendant - Lim Ping Kok; M/s CL Teh & Lim

(Civil Suit No: LBN-22-15-6-2013)
 For the 1st, 2nd, 3rd, 4th, 5th & 6th plaintiffs - Joan Goh; M/s Goh & Assocs
 For the defendant - Lim Ping Kok; M/s CL Teh & Lim

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] The parties have agreed that Suit LBN-22-7-4-2013 (referred to as the first suit) and Suit LBN-22-15-6-2013 (referred to as the second suit) be set down for joint trial. The plaintiff in the first suit has applied to withdraw as the first plaintiff in the second suit and is the only plaintiff in the first suit against the defendant. There are six remaining plaintiffs in the second suit against the defendant. The plaintiff in the first suit shall be referred to as the

- A plaintiff whereas the plaintiffs in the second suit shall be referred to as the first, second, third, fourth, fifth and sixth plaintiff respectively. The same defendant in both suits shall be referred to as the defendant.
- [2] The plaintiffs have applied to amend their pleadings in each of the suits and the defendant has filed an amended defence in both suits. The
- B pleadings in both suits are similar.
- [3] At the commencement of trial the parties agreed to the authenticity of the documents in the bundles of documents filed except that the defendant did not agree to pp. 14-15 of BOD1 which is Lampiran A at pp. 12-13 of BOD2 to which the defendant had agreed as to the authenticity. This is not
- C in dispute. The parties agreed that the contents were subject to proof. The parties did not file any agreed issues for trial. The plaintiffs called ten witness and the defendant called one witness for the trial.
- [4] In both suits the plaintiffs were the owners or operators of lorries or
- D trailers carrying on the business of transporting goods between Sabah and Labuan. They contended that by virtue of a licence granted by the Government of the State of Sabah to the defendant, the defendant became the sole operator and monopoly of the ferry services between Menumbok, Sabah and the Island of Labuan until the middle of 2012. In the first suit the
- E plaintiff submitted that it was until 23 July 2012. The plaintiffs in the second suit pleaded that it was until January, 2013.
- [5] The plaintiffs contended that they had no alternative but to use the ferry services to carry out their business in transporting goods between the two points. The plaintiffs submitted that by reason of the monopoly and by
- F virtue of the doctrine of prime necessity, the defendant was under a duty to act in the public interest to serve all in providing its services to the public without discrimination, without unreasonable exclusion, and at reasonable prices in accordance to the charges regulated by the relevant authorities.
- [6] The plaintiffs in both suits have pleaded and set out in the particulars
- G the existing and increased fares for the ferry services in their respective amended statement of claim. The plaintiffs in both suits complained that in January, 2011 the defendant unilaterally and unlawfully increased the charges for the use of the ferry services between the two points. The existing
- H ticket price for a ton lorry carrying a load was at RM270 whereas the increased ticket price from Menumbok to Labuan was RM1,080 per lorry and it was RM1,120 per lorry from Labuan to Menumbok. The plaintiffs complained that in April, 2012 the charges were increased to RM1,500 and RM1,800 depending on the types of vehicles used. They complained that they had to incur extra charges and had suffered loss in their business.
- I [7] They had complained about the increase in the fares to the relevant authorities which were publicised in the media. They contended that as a result of their complaints, the defendant retaliated and abused its monopoly

to refuse the plaintiffs, its agents and vehicles to use the ferry services despite attempts to buy the tickets and to use the ferry services. They complained that as a result they could not deliver goods and services to their clients between the two points, that four of their vehicles were stranded on Labuan for many months, they lost the use of these vehicles and they had suffered loss and damages.

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[8] Further, the plaintiffs in the second suit *inter alia* sought a declaration that the excessive charges imposed by the defendant from December, 2009 until 16 August 2012 were unlawful, null and void and for an injunction against the defendant.

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[9] In the first suit, the plaintiff testified that he has a transportation delivery service business trading under the business name of Ta Lee Transportation which owned a number of lorries and other vehicles for this purpose. He said that he was appointed by Gold Coin Feedmill (Sabah) Sdn Bhd (Gold Coin) as its official transport provider to transport and deliver animal feeds from Labuan to several farms and locations in Sabah. The contract was from 2007 to 2013. The plaintiff testified that for this purpose his vehicles had to use the ferries daily between Menumbok and Labuan.

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[10] He said the Ministry of Infrastructure Development, Sabah had authorised ticket fares at RM205 per empty lorry and RM270 per laden lorry for 9 tonnes lorry. The authorised ticket fares for 11 tonnes lorry was at RM450 per empty lorry and RM550 per laden lorry. He said in January, 2011 the defendant had unilaterally and unlawfully imposed unreasonable prices for the use of the ferry services between Menumbok and Labuan and he had incurred extra charges and had suffered loss. These were set out in the particulars in para. 8 of the amended statement of claim which amounted to RM133,990.

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[11] Similarly, in the second suit, the plaintiffs therein claimed for the loss or refund of these increased fares which they said aggregated to RM1,250,860.

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[12] The plaintiff in the first suit said two of his vehicles namely LD663 and LD177 were stranded for over 14 months in Labuan and could not return to Sabah. The first plaintiff in the second suit similarly had two of her vehicles namely LD811 and LD6116 stranded in Labuan. They said they were only able to ship back the stranded vehicles on 23 July 2012 by tug boat and barge. The plaintiff in the first suit said that the expenses incurred amounted to RM2,046. However the first plaintiff in the second suit did not claim for such expenses incurred. Both of these plaintiffs claimed for loss of the use of their vehicle and loss of profits for 14 months.

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[13] The plaintiff in the first suit also testified that as a result he was not able to deliver the feeds from Labuan to Sabah under his contract with Gold Coin. He said this caused him to suffer a breach of his contract with Gold

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- A Coin. He said on 26 May 2011 Gold Coin terminated the contract and he had suffered loss and damages. The plaintiff claimed for annual loss of RM1,106,213.40 calculated over 21-month period for loss of business which amounted to RM1,935,873.45 and RM100,000 for loss of reputation and inconvenience against the defendant.
- B [14] The defendant contended that it was not the sole appointed operator and did not monopolise the ferry services between the two points. The defendant submitted that the doctrine of prime necessity does not and is not applicable to Malaysia and there was no duty on the defendant to act in the public interest.
- C [15] DW1, who was the chairman of the board of directors of the defendant, testified that the charges authorised by the Sabah Infrastructure Development Ministry were only applicable to ferries operated by the government which did not apply to the defendant. He said these charges referred to were merely guidelines and not mandatory. He said his company
- D was at liberty to set its charges under the terms of its contract with the government and that the charges imposed in 2011 for the use of the ferry services were just and reasonable based on the circumstances of each transaction.
- E [16] He said that each ticket price was determined by the weight and size or dimension of the vehicle and the weight and size of the cargo or load. He said although the plaintiffs had made complaints against the defendant, no action was taken against the defendant by the relevant authorities based on the complaints of the excessive and unreasonable charges and that there were no merits in the complaints made by the plaintiffs.
- F [17] He testified that the demand for ferry services exceeded supply. He said members of the public could buy ferry tickets in advance which resulted in long queues and long waiting time at the ferry terminals, especially during peak seasons. He said due to the demand his company had absolute discretion to sell the tickets and to choose or refuse any one from
- G using the ferry services due to illegality and or unlawfulness. He contended that the company and its business was not a monopoly and did not abuse its powers as a monopoly.
- H [18] The defendant submitted that the plaintiffs did not suffer any loss or damages and they had failed to mitigate their losses. The defendant submitted that there were alternative means of transportation between the two points and that there were no merits in the plaintiffs' claims for damages against the defendant.
- I [19] Based on the pleadings, the question is whether the defendant at the material times being the sole operator of the ferry services between Menumbok and Labuan had a monopoly over the said ferry services. On evidence adduced, the Sabah Government pursuant to its privatisation

policy had appointed the defendant as the sole operator to take over and operate the ferry services including acquiring the existing ferries from the government between Menumbok and Labuan commencing from 2 April 1995 and expiring on 1 April 2000.

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[20] This contract was extended for another ten years pursuant to a contract dated 21 June 2000 which expired on 20 June 2010 (see pp. 3-33 of BOD3). Upon its expiry the contract was not extended but the defendant continued to operate the ferry services between the two points pending a decision of the government.

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[21] Due to the complaints of the plaintiffs on the unreasonable charges and abuse of its monopoly position, a show cause letter was issued to the defendant who had replied to that letter (see pp. 42-43 of BOD3). As a result of the complaints, the government appointed another two operators to operate the ferry services between Menumbok and Labuan. These two operators were to commence service from 12 January 2011 but could not do so due to licensing problems and problems to acquire suitable ferries to be used for the services.

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[22] DW1 testified that these two other operators could only commence service in the second half of 2012, just before Hari Raya in that year. He was asked and confirmed that it was on 12 August 2012. PW1 who was the Director of Jabatan Pelabuhan Dan Dermaga Negeri Sabah (JPD) and PW3 who was the Permanent Secretary of the Ministry of Infrastructure Development, Sabah confirmed that the defendant at the material times was the sole operator of the ferry services between the two points.

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[23] The defendant was the sole operator of the ferry services between the two points up to 12 August 2012. These services were open to and used by the public. There was no other ferry operator or any other operator or person providing such ferry services between the two points up to that date. Clearly it had a monopoly and the sole provider of the ferry services between the two points up to that date which were used by the public.

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[24] The plaintiffs submitted that the common law doctrine of prime necessity applies so as to make the defendant liable, citing cases in support of their submissions: *Sky City Auckland v. Wu* [2002] 3 NZLR 621; *Iveagh (Earl) v. Martin and Another* [1960] 2 All ER 688; *Minister of Justice for the Dominion of Canada v. City of Levis* [1919] AC 505. The defendant submitted that the principle of prime necessity does not apply in Malaysia. However it did not refer to any authorities in support of its contention. Counsel for the parties did not cite any Malaysian authorities in support of their submissions.

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[25] The question is whether the common law of prime necessity applies in Malaysia. In *Allnutt v. Inglis* [1810] 12 East 527 which concerned a monopoly use of a warehouse, the doctrine of prime necessity was set out as follows:

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- A every man may fix what price he pleases upon his own property or the use of it but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms... it is enough that there exists in the place and for the commodity in question
- B a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches... as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.
- C [26] It was decided in the case of *Sky City Auckland v. Wu (supra)* that under the doctrine of prime necessity, a business invested with monopoly of a public privilege must in the absence of good cause in a particular case make its facilities available to all and at a reasonable price. The courts in New Zealand have applied the doctrine of prime necessity as part of the common laws of New Zealand under s. 5 of the Imperial Laws Application Act 1988,
- D which is similar to s. 3(1) of the Civil Law Act 1956: see *Vector Ltd v. Transpower New Zealand Ltd* [1999] 3 NZLR 646. This doctrine was also accepted as part of the common laws of Canada in the case of *Minister of Justice of the Dominion of Canada v. City of Levis* [1919] AC 505, which is a Privy Council decision and applicable in Malaysia.
- E [27] In the Privy Council case referred to above, it decided that the supply of water is a matter of prime necessity and that there is an implied obligation on the respondents to give the water supply in consideration to make a fair and reasonable payment. This doctrine has been extended to the supply of electricity, gas and other essential services. However the doctrine gave no
- F guidance as to how to fix prices. In a modern economy there are extensive legislative or government interventions on price controls, including in Malaysia.
- G [28] Section 3(1)(b) of the Civil Law Act 1956 states that save so far as other provision has been made or hereafter be made by any written law in force in Malaysia, the court shall in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the first day of December 1951 provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the
- H States of Malaysia and their respective inhabitants permit and subject to such qualifications as the local circumstances render necessary. In West Malaysia, the relevant date is 7 April 1956.
- I [29] Based on the facts of this case that the defendant at the material times was the sole operator and had a monopoly over the ferry services between the two points, that there is no bridge or land connection or link between Labuan and Sabah, although there have been many requests for such a link,

and that the ferry services being the only link, the said ferry services operated by the defendant under the aegis of the Sabah Government are essential to trade, commerce and transportation between Labuan and Sabah.

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[30] The parties have not referred to any statutes or any authorities that this doctrine is not applicable or is not part of the common laws of this country. They have not adduced evidence or referred to any local circumstances which qualify or exclude the application of this doctrine as part of the common laws of this country. In fact under s. 10(1) of the Competition Act 2010, an enterprise is prohibited from engaging whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

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[31] Based on s. 3(1) of the Civil Law Act, the authorities cited, and the facts and circumstances of this case, there is no reason why the doctrine of prime necessity should not or is not applicable or cannot be part of the common laws of this country.

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[32] The next question is whether the defendant being the sole provider of the essential services was required to charge a reasonable price for the services provided. The plaintiffs submitted that the defendant had abused its monopoly and had unlawfully increased the ferry fares to the plaintiffs contrary to the fares set out in Lampiran A and in a letter dated 8 January 1991 issued by the Ministry of Finance of Sabah (MOF) (referred to MOF letter). The plaintiffs submitted that the increased prices imposed by the defendant were excessive and unreasonable.

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[33] The defendant submitted that after its contract expired on 20 June 2010, it was not bound by the terms and conditions of the contract nor any fares set by JPD or by MOF. It submitted that it was at liberty to set the ferry ticket prices and that the ticket prices charged to the plaintiffs were fair and reasonable.

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[34] The defendant also claimed that the plaintiffs had 'menipu' or cheated the defendant by declaring their vehicles as lorries instead as trailers and by under-declaring the weights or loads or dimensions of the lorries when using the ferry services. The defendant submitted that the plaintiffs' lorries were overloaded and had exceeded 25 tons. The defendant submitted that it had suffered losses as a result. Since 6 January 2011 the defendant had re-classified the plaintiff's vehicles as trailers and charged the plaintiffs at RM1,080 as trailers accordingly under Item 12 of Lampiran A. The defendant did not plead that the plaintiffs had cheated the defendant as such and must be bound by its pleadings.

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[35] Notwithstanding the fact that the defendant was the sole operator and had a monopoly in respect of the said ferry services, based on the evidence, the Sabah Government had regulated the fares for the ferry services between the two points since 1991. These fares were set out in Lampiran A annexed

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- A to a letter dated 1 February 2011 from JPD addressed to the defendant and in the MOF letter. Under cl. 8 of the contract entered into between the Sabah Government and the defendant, the defendant was required to charge the existing fares and no increase in the fares was allowed without the prior written consent of the government.
- B [36] Although the contract had expired, the letter dated 1 February 2011 from JPD to the defendant (see p. 10 of BOD2) reminded the defendant and affirmed the ferry rates applicable for lorries and trailers set out in the Lampiran A and to the fares set out in the MOF letter.
- C [37] This letter dated 1 February 2011 was sent after the defendant's contract with the government had expired on 20 June 2010 and after the two operators had been appointed to commence the ferry services from 12 January 2011. The two operators could not commence service on 12 January 2011 and hence this letter of reminder to the defendant to observe the ferry charges imposed by the government. Clearly these charges were
- D applicable to the ferry services operated by the defendant at the material times. (The Lampiran A is exhibited at pp. 12-13 of BOD2 and the MOF letter dated 8 January 1991 is exhibited at p. 16 of BOD2).
- E [38] In Item 6 of the MOF letter, the one-way ferry fare for a 8 ton unladen lorry was RM160 and RM240 for a laden lorry whereas it was at RM250 for a 10 ton unladen lorry and RM300 for a laden lorry. In Item 7 of the Lampiran, the fare for a 9 ton unladen lorry was RM205 whereas it was RM270 for a 9 ton laden lorry. Under Item 12, the fare was RM1,080 for a trailer exceeding 25 ton. These were the regulated fares.
- F [39] The evidence showed that on 4 January 2011 the defendant charged RM270 for one of the plaintiffs' lorries namely SAA42R which was a 9 ton lorry or truck for using the ferry services. Two days later, on 6 January 2011, the defendant charged the plaintiffs RM1,080 for the same lorry bearing SAA42R for the use of the ferry services (see pp. 3 20-21 of BOD1) after it
- G re-classified the lorry as a trailer and because it contended that it exceeded 25 tons. The defendant also contended that the lorries exceeded the dimensions. The defendant did not give any notice of such increases in the fares or the changes or amendments to the terms of use of the ferry services. There were numerous examples of these unilateral increases in the ferry fares at the material times, which were referred to by the witnesses and which
- H were exhibited in the bundles of documents. It must be noted that the fares set out in Lampiran A and the MOF letter did not refer to and were not based on the sizes or dimensions of the vehicles.
- I [40] Although Lampiran A and the MOF letter provided for unladen and laden weights of lorries and trailers as a basis to charge the ferry fares in accordance to the weights, the evidence established that there was no weighbridge at the ferry terminals at Menumbok and Labuan. This was

confirmed by PW1 and PW3. Since 1995 the defendant had operated the ferry services between the two points, it did not and had not installed any weighbridge or weighing machines at the ferry terminals.

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[41] Therefore the defendant did not and could not weigh the lorries or vehicles of the plaintiffs when using the ferry services to determine the correct fares to be charged in accordance to the weights. The defendant was also not in a position to contend that the weights of the lorries or the loads carried had exceeded 25 tons. It could not charge ferry fares at RM1,080 per lorry on the plaintiffs' lorries because they exceeded 25 tons.

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[42] Based on the evidence adduced, since the defendant commenced and operated the ferry services between Menubok and Labuan, the defendant had charged ferry fares to the plaintiffs based on the weights of the vehicles as stated in the registration cards of the vehicles of the plaintiffs. The defendant had previously asked and the plaintiffs had provided the registration cards to the employees or servants of the defendant which formed the basis for the calculation for the ferry fares for the vehicles to use the ferries. The registration cards showed that these were mainly 9 ton vehicles. These registration cards were referred to by the witnesses which are exhibited in the bundles of documents and not disputed.

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[43] The evidence showed that commuters or vehicles using the ferry services including the plaintiffs could and had called in advance to buy the ferry tickets. Based on the testimonies of the plaintiffs' witnesses, the application forms for the tickets (Borang Pengesahan Kenderaan) were filled in by the employees of the defendant. Some of these stated the weight of the lorries as 9 ton while the tonnage was not filled in or stated in most of the forms as exhibited and referred to.

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[44] The plaintiffs have subpoenaed one employee of the defendant as a witness to confirm as such. During the trial DW1 confirmed that this particular witness refused to attend because of a typing or spelling error in his name. The names of two other employees of the defendant were mentioned in the police reports. DW1 informed that they had resigned and could not be contacted. In any event the defendant did not adduce any evidence to the contrary.

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[45] On the evidence adduced, the fares or charges set out in Lampiran A and the MOF letter were applicable to the ferry services operated by the defendant. The defendant was required to charge the fares in accordance to Lampiran A and the MOF letter. The defendant did not apply and did not obtain consent from the relevant authorities to charge any other fares not set out in these two documents and could not unilaterally do so. There was no basis for the defendant to charge or increase the ferry fares at the rate of RM1,080 for a 9 ton, whether laden or unladen, lorry or trailer. In doing so, it failed to charge the regulated fares and must refund the differences.

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- A [46] In both suits, the plaintiffs have established that they were required by the defendant to pay the increased fares not in accordance to the fares set out in Lampiran A and the MOF letter and that they had incurred additional costs and losses.
- B [47] In the first suit, the plaintiff has exhibited the registration cards of his vehicles set out in para. 8 of his amended statement of claim except that of the vehicle SB8480. Although the plaintiff has set out the differences in the ferry fares paid and the ferry tickets in respect of the vehicle SB8480, the plaintiff did not produce the registration card of this vehicle to show that he owned or operated this vehicle. The plaintiff has failed to establish that he
- C owned or operated this vehicle and is not entitled to a refund of the sum of RM21,320. The defendant is required to refund the differences in the fares amounting to RM112,670 only to the plaintiff with interest thereon at 5% per annum calculated from 6 January 2011 until full payment.
- D [48] In the second suit, based on the documents produced in the bundles of documents, the defendant is required to refund the sums of RM14,760 to the first plaintiff, RM204,610 to the second plaintiff, RM95,140 to the third plaintiff, RM60,680 to the fifth plaintiff and RM18,640 to the sixth plaintiff, with interest thereon at 5% per annum calculated from 6 January 2011 until full payment.
- E [49] In respect of the fourth plaintiff's claims, based on the vehicles registration cards, he failed to establish that he owned or operated the lorry SA 3100M and SAA 8663Y and is not entitled to claim any refund to the differences in the fares in respect of these two vehicles. The defendant is required to refund RM807,000 only to the fourth plaintiff with interest at 5%
- F per annum calculated from 6 January 2011 until full payment.
- G [50] Next, the plaintiff in the first suit claimed damages against the defendant for inducing a breach of contract. To found a sustainable cause of action for tort of inducing a breach of contract, five conditions are to be fulfilled ie, (1) there must be direct or indirect interference, coupled with the use of unlawful means; (2) the tortfeasor must be shown to have knowledge of the relevant contract; (3) the tortfeasor must be shown to have the intent to interfere; (4) the claimant must show that it has suffered special damages, that is, more than nominal damages; and (5) the claimant must successfully rebut any defence based on justification which the defendant may put
- H forward: see *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211; [1984] 2 MLJ 105. The intention to interfere with the performance of the contract is to be determined objectively: *Tribune Investment Trust Inc v. Soosan Trading Co Ltd* [2000] 3 SLR 405.
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[51] The plaintiff submitted that when a defendant has been reckless or shut his eye to facts, he may be held to have knowledge of the relevant contract: see *British Industrial Plastics v. Ferguson* [1940] 1 All ER 479. Whether the defendant had knowledge of the existence of the contract and whether it intended to interfere with its performance are questions of fact.

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[52] In respect of the plaintiff's claim against the defendant for causing a breach of his contract with Gold Coin, the plaintiff submitted that the defendant its servants or agents were directly or indirectly aware of his contract with Gold Coin because they knew that the plaintiff was providing transport services to Gold Coin due to the frequency of transactions and through documents used during deliveries of goods via the defendant's ferry services.

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[53] The plaintiff said that as a result of the complaints made that the defendant had retaliated and in bad faith refused to sell ferry tickets to him in May 2011 to cause him to be unable to perform his contract with Gold Coin. Two of his vehicles were stranded in Labuan. He submitted that the defendant's actions had caused a breach of his contract and as a result, on 26 May 2011 Gold Coin terminated his contract. The plaintiff submitted that he is entitled to damages, including aggravated damages.

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[54] In his witness statement (WSP1), the plaintiff said that they knew that his business depended on their services and from May 2011 onwards they refused to sell him any ferry tickets. He said the counter staff both at Menubok and in Labuan told him and his drivers that they were not allowed to sell ferry tickets to all of Ta Lee Transport vehicles and that this order came from their boss. However this was not put to DW1 when he was giving evidence. The plaintiff also did not call any of his drivers to substantiate his allegations although these were made in his police reports. The police did not take action because it is a civil case.

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[55] Although the plaintiff has submitted that the defendant's servants or agents were directly or indirectly aware of his contract with Gold Coin because they knew that his company was providing transport services to Gold Coin due to the frequency of transactions and through documents used during deliveries of goods via the defendant's ferry services, he did not testify that he or his drivers had produced or had shown delivery orders, bills of lading or invoices from Gold Coin to the defendant, its servants or agents in respect of the goods being transported. Although he said his drivers had shown the customs declarations to the servants or agent of the defendant, he did not produce the customs declarations, there was no evidence of the contents of these customs declarations and whether they concerned Gold Coin.

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- A [56] The plaintiff did not produce or exhibit any of these documents in court to establish that these documents were shown to the defendant, his servants or agents or that these concerned Gold Coin. There was no evidence that the goods transported had markings or logos or brands to show that these goods belonged to Gold Coin or from the markings or logos or brands that
- B the defendant knew that his lorries were transporting goods belonging to Gold Coin or that he was contracted to transport goods belonging to Gold Coin. There was no evidence to establish that based on the documents or the goods transported that the defendant its servants or agents knew or were aware of the existence of the Gold Coin contract.
- C [57] The evidence showed that the first plaintiff in the second suit has exhibited some invoices from 28 January 2010 to 1 June 2011 issued to Gold Coin. However, she did not testify that she was a contractor of Gold Coin or a sub-contractor of the plaintiff for Gold Coin. She did not testify that these goods were transported in her vehicles or in the vehicles belonging to
- D the plaintiff or whether they were transported in ships or vessels. These invoices did not refer to registration numbers of vehicles used to transport the goods, whether they belonged to her or to the plaintiff in the first suit. There was no evidence that based on these invoices that the defendant knew that the plaintiff in the first suit had a contract with Gold Coin or that the
- E first plaintiff had a contract with Gold Coin.
- [58] Based on the pleadings and evidence adduced, there were more than twenty vehicles belonging to the plaintiffs in both suits which were used to transport goods between the two points. None of the vehicles belonging to the second, third, fourth, fifth or sixth plaintiffs were prohibited, banned or
- F prevented from using the ferries or stranded or affected. They did not complain that the defendant refused to sell the ferry tickets to them or their drivers except that the defendant had unlawfully increased the prices of the ferry tickets.
- [59] In the first suit, the plaintiff listed eight of his vehicles in transporting
- G goods between the two points but only two of his vehicles namely LD663 and LD177 were stranded in Labuan. However, in his police reports, he referred to four of his vehicles being affected, namely LD663, LD177, LD811 and LD6116. He did not plead in para. 8 of his amended statement of claim that LD811 and LD6116 belonged to him or his company. This was
- H a discrepancy and raised some doubts in his evidence. There was no evidence that his other vehicles were so affected.
- [60] In the second suit, the first plaintiff contended that two of her vehicles namely LD811 and LD6116 were stranded in Labuan. However, in para. 12 of her amended statement of claim, she pleaded that she owned or operated
- I one vehicle only, namely LD811. Further, in the police reports lodged by the plaintiff, he claimed LD811 and LD6116 to belong to him. These contradicted the claim of the first plaintiff in the second suit.

[61] There was no evidence that the defendant its servants or agents had threatened or intended to interfere with the performance of the Gold Coin contract. There was no evidence that the defendant its servants or agents with the requisite knowledge of the existence of the Gold Coin contract that they procured the breach of it or intended to interfere with its performance.

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[62] Although two vehicles of the first plaintiff in the second suit were stranded in Labuan together with the two vehicles of the plaintiff in the first suit, which were shipped back to Sabah together using the barge and tug boat, she did not complain that the failure or refusal to sell the ferry tickets to her or her drivers had caused her to breach her contract with third party and did not corroborate the contention of the plaintiff in respect thereof.

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[63] On the balance of probabilities the plaintiff has failed to establish that the defendant knew of the Gold Coin contract and therefore intended to interfere with its performance.

[64] Although the plaintiff said that two of his vehicles were stranded in Labuan and that he could not transport goods on behalf of Gold Coin which resulted in his contract to be terminated, the plaintiff could easily and should have contracted or subcontracted the second, third, fourth, fifth and or the sixth defendant to transport the Gold Coin goods on his behalf since they were not affected by the ban or refusal by the defendant to sell the ferry tickets to them. If the plaintiff had done that, his contract with Gold Coin could be performed, would not be affected and would not be terminated.

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[65] Although the plaintiff and the first plaintiff had contended that their vehicles were stranded in Labuan for 14 months, they did not mitigate their loss. They did not and could have appointed another haulage or transportation company to transport their vehicles from Labuan to Sabah, and as soon as possible. They did not lead evidence that they had written or advertised in newspapers or other media requesting or seeking tug boats and barges or landing crafts or other suitable vehicles to transport their vehicles from Labuan to Sabah. There was no reasonable explanations why they did not do so or why it took them so long to do so.

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[66] In respect of the damages, the plaintiff testified that his yearly income from the Gold Coin contract was between RM1.5 million to RM2 million. He said between 3 April 2010 and May 2011, his revenue from Gold Coin alone amounted to RM1,660,255 after deducting operation costs. He said his gross profit for the year was RM930,000. He said therefore this was his loss.

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[67] Although the plaintiff has referred to a summary of a list of invoices and payment receipts with Gold Coin (see pp. 245-331 of BOD1), as stated, the plaintiff did not produce any delivery orders, invoices, receipts or customs declarations: see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360. The plaintiff also did not produce any accounts or audited

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A accounts to show his revenues, expenses, costs, the gross and net profits of his business. He did not produce any such accounts for the year 2010, 2011 and 2012 to substantiate his profits which formed the basis of his claim.

[68] He did not produce any bank statements to show the flows of funds in and out of his accounts in respect of his business under Ta Lee Transportation which had a contract with Gold Coin. The plaintiff also did not produce any income tax declarations or tax submission forms to substantiate his incomes, profits and the amount of taxes he paid in respect of his earnings.

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[69] Although the plaintiff submitted and claimed RM1,935,873.45 for loss of business and RM100,000 for loss of reputation and inconvenience, these were not specifically pleaded. In the first suit, the plaintiff has failed to establish his claims for damages against the defendant for procuring the breach of his contract with Gold Coin or for damages for loss of use of his vehicles.

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[70] In the second suit, the first plaintiff has similarly failed to establish her claims for damages. Based on the dates pleaded, there is no need for the declaration sought nor for the injunction to restrain the defendant. For the reasons given in this judgment, they are now academic.

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[71] The parties did not submit any bill of costs or any document in support of the disbursements incurred or on the costs to be awarded at the end of the trial. Based on the issues raised in the two suits, the number of witnesses who testified and on documents exhibited in the bundles of documents, it was not a complicated case. Although the doctrine of prime necessity has not been decided in the country, the facts and the law are straight forward. The trial lasted three days although parties requested four or five days to be set aside for the trial. Based on these considerations, the plaintiff in the first suit is awarded costs of RM25,000 including disbursements. In the second suit, costs of RM30,000 to the first, second, third, fourth, fifth and sixth defendants jointly including disbursements.

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